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Brian Ikejiaku

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The recent global financial crisis: delinking security-protectionism and relinking fraudulent misrepresentation in MNCs and the global market—contending existing issues in international law and international relations

*Brian Ikejiaku**

Abstract

The global financial crisis that started in the late 2000s incited a heated debate in academic circles with divergent viewpoints. The view that dominated the debate between 2008 and early 2010, was politics that is protectionist-bid of the US and UK—that is, the war on terror, particularly in Afghanistan; and/or the quest for mineral-resource wealth—for example, the US invasion of Iraq. However, since mid-2010 the perspective has shifted to global business in most quarters with some crucial legal issues. This article argues that the primary problem is not that the GFC has affected businesses, but rather that the reverse is the case—the fraudulent business activities of multinational corporations (MNCs) and poor corporate-governance accountability issues, specifically fraudulent misrepresentations, are at the root of the crisis. This article examines on the one hand the impact of politics—security-protectionism—and on the other hand the implication of fraudulent misrepresentations within global business on the recent GFC. This is examined in theory and is analysed by applying such theory in practice using two brief empirical illustrative cases: the strained US-China economic relations and the Euro-zone crisis; as well as other examples, such as Lehman, Enron, Anderson, Mediaset and Mahindra.

* Senior Lecturer in law Coventry University, United Kingdom. Brian was formerly a principal lecturer in law at the British Institute of Technology, England (BITE) University Centre UK. He is an international interdisciplinary scholar of international law and international relations; his research takes into account Western and non-Western perspectives and methodologies within the framework of international development. He was a member of the Research Institute for Law, Politics and Justice at Keele University, UK and formerly served as a lecturer in law at the Madonna University, Nigeria. His recent works feature in JDIR (2015), LDR (2014) and AJLS (2014). He has also taught law and/or politics/IR in different institutions in the UK and overseas, including BITE-Coventry programme, BITE-Staffordshire programme, Derby University (online), Madonna University, VERITAS University, and the Institute of Management and Technology, Nigeria Brian was appointed as a visiting Professor to the European University College of Business in 2016 in Poznan, Poland.

INTRODUCTION

The recent global financial crisis (GFC) has been attributed to different factors.[1] The crisis, which started in the late 2000s, has elicited heated debate in academic circles with implications for policy and practice. Various approaches have emerged. One of the views dominating this debate between 2008 and early 2010 was that it represented a political and protectionist bid by the United States (US) and the United Kingdom (UK), exemplified by the war on terror—particularly in Afghanistan—and/or the quest for mineral-resource wealth—for example, the US' invasion of Iraq.[2] However, the more dominant discourse, and the majority view in most quarters, centre on business and raise certain crucial legal issues.[3] It is on these primary

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1 While it is almost impossible to disentangle the causes of the global financial crisis, the most often discussed causes include (1) deregulation of financial markets; (2) sophisticated financial innovations linked to rapid changes in computer technologies; (3) excessive executive compensation; (4) low interest rates; (5) subprime loans, especially for mortgages; (6) speculation in general, with an emphasis on speculation in housing. The author also added (7) fraudulent misrepresentation; and (8) securitisation on war against terror, on which this article focuses on.

2 For example, the views that link politics, particularly securitisation about war on terror to the GFC, include those of respected global authors like Linda J Bilmes (a faculty member at Harvard University) and Joseph E Stiglitz a professor at Columbia University and the recipient of the Nobel Prize in economics who have argued in this direction—see Linda Bilmes and Joseph Stiglitz, 'America's Costly War Machine' (*Los Angeles Times* 2011) <www.terror-articles.latimes.com/2011/sep/18/opinion/la-oe-bilmes-war-cost-20110918> accessed 12 July 2015; Chossudovsky also argues that the global economic crisis was accompanied by a worldwide process of militarisation—see Michel Chossudovsky, 'The Global Economic Crisis: The Great Depression of the XXI Century' (Montreal Global Research 2010). It has been suggested that the securitisation that followed the terrorist attacks of 11 September 2001 undermined the stability of the US and the international financial system—see Barry Johnson, and Oana Nedelescu, 'The Impact of Terrorism on Financial Market' (IMF Working Paper: Monetary and Financial Systems Department 2005); also militarily, it has impacted on the global financial crisis, including causing global dislocations and precipitating millions of people into abject poverty—see Michel Chossudovsky, 'America's War on Terror: The Dangers of a US Sponsored Nuclear War' (Global Research 2006).

3 Making reference to the effect of business on the global financial crisis, Friedman argues on the greed of the financial elite—see George Friedman, 'Global Economic Downturn: A Crisis of Political Economy' (2011) <http://www.stratfor.com/weekly/20110808-global-economic-downturn-crisis-political-economy> accessed 17 October 2012; Juurikkala suggests that excessive greed in global business in the trading of credits and derivatives links to the financial crisis—see Oskari Juurikkala, 'Greed Hurts: Causes of the Global Financial Crisis' (Action Institute Roma Italy 2008). Also, research indicates that the financial crisis of 2008 and beyond was marked by widespread fraud in the mortgage securitisation industry—see Niel Feinstein and Alexander Roehrkasse, 'The Causes of Fraud in Financial Crises: Evidence from the Mortgage-Backed Securities Industry' (University of California 2015).

themes that I concentrate in this article[4] by considering the impact of both politics and business regulation on the recent GFC.

I argue that the primary problem is not that the GFC has affected businesses; rather, the reverse is the case[5]—the fraudulent business activities of multinational corporations (MNCs) and poor corporate governance regulation have impacted on the global economy. In other words, the position I advance is that corporate social responsibility (CSR) and corporate governance accountability issues, particularly fraudulent misrepresentation (FM), lie at the root of the recent GFC, have led to the collapse of global firms, and have implicated their executives.[6]

Therefore, my hypothesis is that one of the primary causal forces behind the recent GFC is FM perpetrated by certain global firms and the global market as a whole. I consider FM in theory by contextualising and explaining the legal principles governing FM in the law of contract. This is illustrated by analysing and applying the theory and principles to empirical cases drawn from the recent GFC. I adopt theoretical, empirical-analytical, and interdisciplinary law approaches within the framework of international (commercial/ business) law and international relations.

In section 2, I consider the types and meaning of misrepresentation, and of FM in particular. This is aimed at understanding the basic legal principles governing misrepresentation, and/or FM, as used in the law of contract and serves as a background to the article. In an attempt to consider the implications of FM and apply them to the GFC, in section 3, I briefly consider the impact of politics on the recent GFC. Section 4 offers concise

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4 The article looks at the impact of politics and business on the recent global financial crisis (GFC); it concentrates on establishing whether fraudulent misrepresentation is one of the key causes of the recent GFC. It also discusses the impact of the GFC within the global system using two cases: the strained US-China economic relations (due to the activities of the US banking sector for precipitating the subprime crisis) and the Euro-zone crisis being an aftermath of the GFC; as well as other example such as Lehman Brothers Holdings Inc (USA), Enron Corporation (USA), The Anderson Inc (US), Mediaset Italia (Italy) and Mahindra & Mahindra (India).

5 See Brian-Vincent Ikejiaku, 'Ethical and Legal Aspects of Corporate Social Responsibility: The Issue of MNCs and Sustainable Development' (2012) 1 Nordic J of Commercial Law 1.

6 Note that while some scholars agree that generally CSR, ethical, legal and/or corporate governance accountability issues are at the root of the recent global economic downturn, they have failed to identify the specific aspect of these issues. See for example Baladudram Maniam and Helen Teetz, 'Current Realities of Ethical Issues in Corporate America: How Does Ethics Effect the Financial Arena' (2005) 8 (2) J of Legal, Ethical and Regulatory Issues 2; Edward Lazear, 'The Global Society: Content and Limits of Corporate Social Responsibility' (Global Economic Symposium 2009); Halina Ward, 'Corporate Social Responsibility and the Business of Law' (GLOBALT ASSVAR, Swedish Partnership for Global Responsibility 2005); Bryan Horrigan, '21st Century Corporate Social Responsibility Trends—An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability' (2007) 4 Macquarie J of Business Law 85–122; and Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006).

illustrative evidence of the impact of the GFC using the US-China 'strain' economic relations; the regulatory roles of the WTO, GATT and the TRIPS Agreement;[7] and the Euro-zone crisis. I further include an examination of certain of the stringent regulatory rules in the Euro-zone. Section 5 presents an analysis of FMs in the business activities of MNCs and the global market as a primary causal factor for the GFC. In section 6, I offer relevant recommendations and I summarise my findings.

SECTION 2: MISREPRESENTATION

Precise Meaning

A misrepresentation is a false statement of fact made by one of the contracting parties which, though not a term of the contract, induces the other party to conclude the contract. The effect of an actionable misrepresentation is to render the contract voidable,[8] giving the innocent party the right to cancel the contract and/or claim damages. An actionable misrepresentation must, therefore, be a false statement of fact as opposed to an opinion, a future intention, or a prediction of future events.[9]

Once misrepresentation has been established, the next step is to classify it. There are three types of misrepresentation: fraudulent; negligent;[10] and wholly innocent misrepresentation. While I concentrate on FM,[11] the importance of distinguishing between the forms lies in the remedies available for each.

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7 The WTO deals with the global rules of trade existing between nations and its primary function is to ensure the free and smooth flows of trade is as predictable as possible. The Preamble of the General Agreement on Tariffs and Trade (GATT) mentions the substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis. Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the most multilateral agreement on intellectual property and covers areas, such as copyrights, related rights, trademarks and patents.

8 Unlike a void contract, which, from the onset, has no legal effect and binds none of the parties even if the contract was not tainted by misrepresentation, since a void contract is not actionable in law per se—a voidable contract has legal effect or force when it is made and therefore can be enforced in law, but can be liable to be substantially annulled or set aside by the courts if tainted by misrepresentation.

9 However, statement of opinion may in some cases be deemed to be fact, as illustrated in *Esso Petroleum v Mardon* [1976] QB 801, an English contract-law case concerning misrepresentation, which holds that the distinction between a statement of opinion and a statement of fact becomes more factual if one holds oneself out as having expert knowledge.

10 This is applicable in common law and in terms of statute under s 2(1) of the Misrepresentation Act 1967.

11 There are three types of misrepresentation: fraudulent misrepresentation, negligent misrepresentation; and wholly innocent misrepresentation. However this article concentrates on fraudulent misrepresentation, being a deliberate act or being knowingly involved in the act of misrepresentation.

Fraudulent Misrepresentation

According to Lord Herschell in *Derry v Peek*,[12] FM is a false statement 'made (i) knowingly, or (ii) without belief in its truth, or (iii) reckless, careless as whether it be true or false.'[13] The burden of proving FM vests in the claimant, and the available remedies include: rescission (restoring the claimant to their pre-contractual position where practicable); and/or claiming damages in tort, without having to prove foreseeability of damages.[14]

Understanding FM in its application to the real business activities of MNCs and the undertakings within the global market is not as 'clear-cut or easy' as in the theoretical consideration of contract or tort.[15] This is important as a fine distinction can be drawn between what constitutes FM in principle and in theory within business undertakings in the global market.

SECTION 3: POLITICS AND GFC—A BRIEF INSIGHT

As highlighted above, the recent GFC, which started in the late 2000s, incited a heated debate in academic circles with implications for both policy and practice. Different views have emerged and in this section, I briefly consider the view linking politics and the GFC.[16]

It has been suggested by a renowned Nobel Prize laureate that 'Wall Street's ill-gotten gains corrupted and continue to corrupt politics in a nicely bipartisan way.'[17]

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[12] [1889] UKHL 1.

[13] See Geoffery Cheshire, Cecil A Fifoot and Michael Furmston, *Law of Contract* (Oxford University Press 2007) 298–303.

[14] This means that the test of remoteness in deceit is whether the injured party may recover all the direct loss incurred due to the fraudulent misrepresentation, regardless of foreseeability. The point is that damages in tort of deceit are assessed on the basis that the representor will be liable in respect of all loss flowing from fraudulent statement. See *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court Securities v Scrimgeour Vickers* [1996] 4 All ER 796. More so, damages may include lost opportunity cost, eg, loss of profits (see *East v Maurer* [1991] 2 All ER 733). In *Archor v Brown* [1984] 2 All ER 267, the court held that the plaintiff was entitled to aggravated damages in deceit for the distress he had suffered. See Cheshire, Fifoot and Furmsten (n 13); Asif Tufal, 'Misrepresentation' <www.lawteacher.co.uk> 24 April 2016. This demonstrates the serious approach adopted by the courts, and the high level of weight that the court attaches while dealing with cases of fraudulent misrepresentation. This is more applicable in fraudulent misrepresentations perpetrated in the business activities of the MNCs or within the global market, as this article will demonstrate.

[15] This means that it appears more easy to understand the theoretical principles of fraudulent misrepresentation in the teaching of law courses (eg, contract, tort, or intellectual property) than in analysing or showing how this occurs in practice, thus identifying the importance, but difficulty in linking theory to practice.

[16] I adduced robust evidence to support the view that politics, particularly the wars on terror, played a role in the causative factors leading to the global financial crisis. See also Bilmes and Stiglitz (n 2).

[17] See Paul Krugman, 'The Madoff Economy' (*New York Times* New York, 9 December 2008).

Before the 9/11 attacks, no single agency was in charge of security in the US. During this period, US security doctrine revolved around two policy principles: the first and primary was the long-standing US policy of containment of communism to Russia in an East-West Cold War ideology of military balance of power, alliance relationships and traditional collective security.[18] As things then were, there appears to have been a notable negation of international organisations, international law and universal collective security in terms of which world security interests were perceived as 'what was good for the US was good for the entire world'—a conceit of nationalistic universalism.[19] The second was the policy of international development, championed by international development agencies and supported or influenced by the US—a policy based on the global awareness that it is individuals and social groups or peoples that need to be protected rather than the state.[20] The US security policy immediately preceding the 2001 terrorist attack was directed towards international development. Therefore, the period between 1995 and 2000 witnessed a relatively high rate of international development and sustainability, as US international security focused increasingly on human security and human development within the poor developing countries, particularly in Asia and Africa.[21] As Rose suggests, after a break of nearly two decades, governments, international organisations, private foundations and law firms are once again investing millions of dollars in international aid projects around the world, particularly in developing regions.[22]

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[18] This brief historical antecedent of the security sector in the US suggests that even during the East-West ideological Cold War, no single agency oversaw the security in the US, so the fierce securitisation agenda within the present time (post 9/11) was due to the terrorist attack in the US.

[19] B Seyom, 'World Interests and the Changing Dimensions of Security' in M T Klare and Y Chandrani, *World Security: Challenges for a New Century* (St Martin's Press 1998) 15.

[20] These include the collapse of the former Soviet Union the emergence of international human rights, the influx on multinational corporations, as well as the hegemony of neo-liberal market concepts of political and economic relations. See, for example, Green R Lawrence, 'Are We Exporting Our Legal System?' (1994) 41(10) Federal Bar News and J 672–679.

[21] For example, between 1995 and 2000, after the first donor round-table conference for development assistance, Rwanda received about US$2.7bn in aid; and a further US$3.9bn was pledged. See Africa's Cooperation with New and Emerging Development Partners: Options for Africa's Development <http://oro.open.ac.uk/19597/1/emerging_economies_2009.pdf accessed 24 October 2011. It is important to note that Rwanda's outstanding reconstruction success under its current benevolent and active dictator, President Paul Kagame, is a consequence of Rwanda being allowed by the international community to use its international development aid to help rebuild the genocide-torn country, rather than the usual international-centric reconstruction. See Brian-Vincent Ikejiaku, 'The International Security Sector Development (ISSD): Implication on Developing Countries' (2014) XVI (1) Journal of Diplomacy and International Relations 155–172.

[22] See Carol Rose, 'The New Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' (1998) 32 (1) The Law and Society Review 33.

However, as events unfolded on the morning of 9 September 2001, the US security policy and the country's approach to the world changed, possibly forever. The events of 9/11 provided a justification for an expansion in US security policy to incorporate the principles of universal collective security and the global war on terrorism.[23] It is the changes in the US security doctrine after the 9/11 attacks that account for the fundamental see-saw between the state/company market relationships, which have seriously impacted on the global economy.

It has been argued that the recent global financial crisis could be traced (or linked) to the terrorist events of 9/11.[24] That attack in the US in 2001 triggered an unparalleled security alert in Western countries, nothing has been the same. It appears to have reshaped not only the international approach to security, but also the global economy. In particular, it has influenced the recent GFC.

US security politics (supported by various countries, most notably the UK) resulted in the declaration of a global war on terror which, in turn, resulted in attacks on terrorist strongholds—for example in Afghanistan and the Persian Gulf. We also saw an escalation in US security the world over, with direct impact on US relations with the rest of the world, particularly regions suspected of harbouring terrorists.[25]

The view that security protectionism, and specifically the war on terror, contributed to the recent GFC, is pronounced. Bilmes and Stiglitz argue in this regard that:

> History has shown that the cost of caring for military veterans peaks decades after a conflict. Already, half of the returning troops have been treated in Veterans Administration medical centers, and more than 600,000 have qualified to receive disability compensation. At this point, the bill for future medical and disability benefits is estimated at $600 billion to $900 billion, but the number will almost surely grow as hundreds of thousands of troops still deployed abroad return home. And it isn't just in some theoretical future that the wars will affect the nation's economy: They already have. *The conditions that precipitated the financial crisis in 2008 were shaped in part by the war on terror. The invasion of Iraq and the resulting instability in the Persian Gulf were among the factors that pushed oil prices up from about $30 a barrel in 2003 to historic highs five years later, peaking at $140 a barrel in current dollars in 2008.* Higher oil prices threatened to depress US economic activity, prompting the Federal Reserve to lower interest rates and

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23 Michel Chossudoysky, 'NATO's Doctrine of Collective Security' (2009) <http://www.rense.com/general188/afgrh.htm> accessed 12 July 2016.

24 See Johnson and Nedelescu (n 2).

25 Joseph Nye, *Understanding International Conflicts: An Introduction to Theory and History*. (6 edn, Pearson Longman 2007).

> loosen regulations. These policies were major contributors to the housing bubble and the financial collapse that followed.[26]

It has also been argued that the global economic crisis was accompanied by a worldwide process of militarisation—a so-called war without borders—led and sustained by the US and its NATO allies; and that the conduct of the Pentagon's so-called long war is intimately related to the restructuring of the global economy. This suggests that the war on terrorism, as an aftermath of the 9/11 attack, contributed to the global financial downturn and is inextricably linked to the impoverishment of millions of people in the US and abroad. Militarisation and the economic crisis are intimately related.[27] Arguing in this vein, Johnson and Nedelescu contend that, by striking at the core of the world's main financial centre, the terrorist attacks of 9/11 aimed at, and appear to have succeeded in, undermining the stability of the US and the international financial system. In the aftermath of the attacks, the financial markets were not only confronted with major disruptions to their activity resulting from the massive damage to property, but also with soaring levels of uncertainty and market volatility.[28]

Research further suggests that the purpose of the US' war on terror—which is to transform sovereign nations into open territories (or free trade areas)—impacted militarily on the global financial crisis, including causing global dislocations and precipitating millions of people into abject poverty.[29] It is also documented that the US security-politics or security-protectionism based on the 9/11 attacks, aggravated the 2001 recession starting in March 2001 when the stock market closed for four trading days after the attacks.[30]

On 20 September, President Bush called for the war on terror. In his speech, he said Americans should not expect a single battle, but rather prepare for a lengthy campaign, unlike any other they had ever seen:[31]

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26 See Bilmes and Stiglitz, (n 2) (author emphasis).

27 See Chossudovsky, 'The Global Economic Crisis' (n 2).

28 See Johnson and Nedelescu (n 2).

29 Chossudovsky, 'America's War on Terror' (n 2).

30 The economy had contracted 1.3 per cent in the first quarter, but had bounced up 2.7 per cent in the second quarter. The attacks made the economy contract 1.1 per cent in the third quarter, extending the recession gradually to other parts of the globe—see Kimberly Amadeo, 'How the 9/11 Attacks Still Affect the Economy Today' (About.com) <http://useconomy.about.com/od/Financial-Crisis/f/911-Attacks-Economic-Impact.htm> accessed 13 October 2015 (Updated 11 September 2017).

31 See The White House, 'Bush Address to a Joint Session of Congress and the American People' (US Capitol Washington DC 20 September 2001) <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.htm> accessed 17 November 2015, where Bush also added that 'Americans are asking: How will we fight and win this war? We will direct every resources at our command—every means of diplomacy, every tool of intelligence, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.'

> Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign. We will starve terrorists of funding, turn them one against another, and drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe havens to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.[32]

The UK and certain other nations joined the war against terrorism. Bush then put his plans into action. He launched the war on Afghanistan to find Osama bin Laden, the head of the Al-Qaeda organisation who master-minded the 9/11 attacks, and to bring him to justice.[33]

On 21 March 2003, President Bush sent troops into Iraq. He claimed that the US Central Intelligence Agency (CIA) had found weapons of mass destruction, and that President Saddam Hussein was aiding Al-Qaeda operatives. In its first year, the War in Iraq virtually doubled the cost of the war in Afghanistan—US$50 billion compared to US$30 billion for the 2003 financial year. And the costs kept mounting. By the end of Bush's term in office, the war on terror had cost US$864.82 billion. This was in addition to increased spending by the Defence Department and Homeland Security.[34]

President Obama, too, increased spending for the war on terror, although he did not call it that. In just three years, he requested US$477 billion—more than half of the cost of the actual Bush war-on-terror initiative, which lasted eight years. The total costs have amounted to more than US$1.3 trillion. Perhaps the biggest economic impact of the 9/11 attacks was inflated spending on defence and security,[35] which had a serious impact on the global economy.

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32 Christian Walter, 'Defining Terrorism in National and International Law' (Springer 2003) <https://www.unodc.org/> accessed 12 December 2015.

33 According to available statistics, the Afghan War did not initially cost much — US$20 billion, plus US$13 billion to launch Homeland Security: see Amadeo (n 30).

34 ibid.

35 Amadeo (n 30). The financial crisis of 2008, also known as the global financial crisis is considered by many economists to be the worst financial crisis since the Great Depression of the 1930s. It resulted in the threat of a total collapse of large financial institutions, the bailout of banks by national governments, and downturns in stock markets around the world. In many areas, the housing market also suffered, resulting in evictions, foreclosures and prolonged unemployment. The crisis played a significant role in the failure of key businesses in declines in consumer wealth estimated in trillions of US dollars, in a downturn in economic activity leading to the 2008–2012 global recession and in contributing to the European sovereign debt crisis. See Carol Williams, 'Euro Crisis Imperils Recovering Global Economy, OECD Warns' (*Los Angeles Times*, 2012) <http://latimesblogs.latimes.com/world_now/2012/05/eurozone-crisis-global-economy.html> accessed 16 November 2016.

As Oatley submits, Military Keynesianism suggests that Operation Iraqi Freedom had internationally systemic consequences in the form of contributing to the global economic and financial crisis of 2007 to 2013.[36]

It has also been suggested that the high military spending on the defence or security-protectionist bid crippled the efficacy of the global economy. In the US, the first sign that the economy was in 2006 in trouble was when real-estate prices started to drop. However, at that time realtors were relieved; it was felt that the overheated housing market would safely return to a more sustainable level. What realtors did not realise, was the number of homeowners with fraudulent and questionable credit who had loans for 100 per cent (or more) of their homes' value.[37] Banks had resold these mortgages in packages as part of mortgage-backed securities.[38]

It can be argued that while international politics, particularly US security-politics or its security-protectionist bid, must have impacted negatively on the global economy, it did not create the recent GFC. However, the fictitious subprime mortgage-backed securities were associated with US banks and the financial industry that fraudulently misrepresented financial products, which culminated in the series of events that precipitated the recent GFC.

SECTION 4: FRAUDULENT MISREPRESENTATION AND THE CURRENT GLOBAL FINANCIAL CRISIS—BRIEF ILLUSTRATIVE CASES

There is a link between FM, perpetrated in business within the global market, and the GFC. Research has shown that fraud, greed and misrepresentation, individually or jointly, influenced the GFC. Friedman, referring to the effect of business on the global financial crisis, argues, on the greed of financial elites that:

> A sense emerged that the financial elite was either stupid or dishonest or both. The idea was that the financial elite had violated all principles of

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[36] Like Vietnam, the US borrowed to pay for the war on terror. If the Vietnam War experience is any guide, this budget deficit must have had consequences for US macro-economic and financial performance. The deficit was larger and persisted for longer than in the Vietnam case. I argue that the choice to finance the war on terror by borrowing, rather than by raising taxes, worsened the US external imbalance and that the resulting 'capital flow bonanza' triggered the US credit boom. The credit boom generated the asset bubble, the deflation of which generated the great global crisis from which we are still recovering: see Thomas Oatley, 'Military Keynesianism and the War on Terror' (International Political Economy: University of North Carolina 18 March 2013) <http://ipeatunc.blogspot.co.uk/2013/03/military-keynesianism-and-war-on-terror.html> accessed 21 July 2015.

[37] Williams (n 35).

[38] See Friedman (n 3). The mortgages-backed securities are packed products that deceptively lured many international investors in buying them, being unaware of the fraud behind the production of these packaged products—the subprime mortgage problem was part of the events that triggered the global financial crisis.

> fiduciary, social and moral responsibility in seeking its own personal gain at the expense of society as a whole.[39]

There is a suggestion that excessive greed and deception in global business in the trading of credits and derivatives link to the financial crisis—the credit and derivative issues, associated with GFC per se, are not problems if used properly. However, the period between the 1990s and 2000s brought a far trickier, and more risky, approach, as credit and derivatives became a massive global gamble that facilitated the GFC.[40] Also, research indicates that the financial crisis of 2008 and beyond was marked by widespread fraud in the mortgage securitisation industry. Most of the largest mortgage originators and mortgage-backed securities issuers and underwriters have been implicated in regulatory settlements, and many have paid multibillion-dollar penalties.[41]

In an attempt to consider the implications of the impact of FM on business and its application to the recent GFC, I offer two brief illustrative cases. I specifically present brief accounts of the impact of FM on the recent GFC, using, first, the US-China so-called strain economic relations, including a consideration of the regulatory roles of the WTO/GATT and the TRIPS Agreement; and secondly, the Euro-zone crisis, including an examination of some of the stringent regulatory rules in the Euro-zone.

US-China 'Strain' Economic Relations[42]

It is well documented that China is the US' second-largest partner. For example, total US-China trade in 2008 reached an estimated US$409 billion. China is also the second-largest holder of US securities and treasuries used to finance the federal budget deficit. The US is one of the largest investors in China.[43]

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39 See Friedman (n 3).

40 See Juurikkala, (n 3).

41 See Feinstein and Roehrkasse (n 3).

42 This article intends not to carry out an in-depth account of the US-China economic relation in regard to the recent global financial crisis, but to give a precise account in order to highlight the effect of fraudulent misrepresentation in the global market (eg, the subprime mortgage device/scam/coined trick/contrived fraud) on the recent global financial crisis.

43 See Daniel Chow, 'China's Response to the Global Financial Crisis: Implications for U.S.-China Economic Relations' (2010) 1 Global Business LR 47; L Yan, 'China and the Global Financial Crisis: Assessing the Impacts and Policy Responses' (2010) 18 China and World Econ 56; Prasad S Eswar, 'Effects of the Financial Crisis on the U.S.-China Economic Relationship' (2009) 29 Cato J 223. Now China's trade with the US accounts for more than fourteen percent of China's total foreign trade volume and for more than twelve percent of the US' foreign trade volume. With the US' huge investments in China, and China holding seventy percent of its $2 trillion foreign reserves in US dollars, including about US$740 billion treasury bonds, the reality is that economic interdependence is so deep that neither can afford to lose the other: see Huang Ping et al 'China-US Relations, Tending Towards Maturity' (2009) 44(2) The International Spectator 9–16. See also Chow (n 43).

China's resentment against the US in recent times is based on US precipitation of the GFC through the subprime mortgage crisis and its impact on China.[44] This is because the US banks and financial industry created absurd fictitious financial products that were sold in huge quantities both in the US and abroad.[45]

These security-package products, and especially subprime mortgages, depreciated and lost most of their worth, thereby causing global investors to reduce their purchases drastically. This led to tightening credit around the world, with some negative effects on major global economies.[46] For example, a full-scale economic crisis affected major developed economies, such as the EU and Japan, with emerging economies experiencing slower growth or even deep recession.[47]

It can be advanced that this raises concerns as to the soundness of the US credit and financial markets and to the fact that China was lulled into establishing close economic ties with the US in the false belief that US had a stable economy, a conscientious government and financial regulators.[48] Some legal issues relating to the WTO's GATT and IP Rights (TRIPS) appear to point in this direction. This aspect is summarised below:

> China became critical of any dealing with the US; for example, China's introduction of the new and robust indigenous 'innovation policy' of its government procurement programme. This is simply a programme where the

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44 This is a series of events that culminated in the global financial crisis; events full of impropriety and dishonesty, such as fraudulent misrepresentation of genuine product, packaged and sold abroad.

45 This is mainly fraudulent misrepresentation of genuine products sold in the global market, particularly subprime mortgages and packed products that deceptively lured many international investors in buying them, being unaware of the fraud behind the production of these packaged products. When the subprime-mortgage problem triggered the global financial crisis, many in China believed that it was naïve and foolish to trust the US. In retrospect, sectors of the financial industry in the US seemed to be reckless, driven by greed and their own personal interests, and oblivious to the effect of their machinations on other countries and the global economy; see Wayne Morrison, 'China's Economic Conditions' (2008) Congressional Research Service Report RS33534, available at<http://digitalcommons.ilr.cornell.edu/key_workplace/499/>.

46 ibid.

47 See Ping (n 43).

48 China has long believed that the US is far superior to China in business and financial matters. However, this belief has faded in China, and many believe that China is now paying the price for having overestimated the business and financial prowess of the US.

> government of China prevents most of US products from entering China.[49] Many US companies are calling this policy unfair, but it appears to have no legal basis, since it is not covered by the World Trade Organisation (WTO) regulations on procurement under General Agreement on Tariffs and Trade (GATT 1994).[50]

In 2007, the US went ahead and filed suit against China in the WTO in the *US v China Intellectual Property Rights* case to pressure China into enforcing its Trade Related Aspects of Intellectual Property Rights (TRIPS) laws more strictly, particularly as they concerned Chinese patents and copyright, and for the US to have greater access to the Chinese market.[51] The US is relying on the National Treatment Principle (NTP)—under Article III of the GATT 1994.[52]

The NTP is a principle contained in Article III of the GATT 1994 and as it falls under the WTO, is administered by that body. It prevents member states from placing onerous conditions on, or discriminating against, the sale of imports at rates lower than those the states impose on their own domestic products. The implication is that US maintains that China is not only discriminating as regards most of its products, but is infringing its IP laws, particularly its patents and copyrights—for example, by pirating American movies. This condition, therefore, might be in violation of NTP.[53]

Although the WTO Agreement on Government Procurement makes the NTP applicable to government procurement, it is a plurilateral agreement—that is, a voluntary agreement to which member states can agree. However,

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49 The assumption that innovation is good under all circumstances is now problematic. The recent global financial crisis has established beyond doubt that certain financial innovation is evidently wasteful and even destructive, see Ernst Dieter, 'China's Innovation Policy Is a Wake-Up Call for America' (2011) 100 (May) Asia Pacific Issues, Analysis from the East-West Centre para 2. Government procurement refers to the purchase by government entities of goods and services. Governments play a major role in the purchase of goods and services in many countries. Although there is pressure to buy local goods, some countries have joined the WTO Agreement on Government Procurement, which requires that its members give equal access to foreign goods and services. Government procurement involves hundreds of billions of dollars of purchases, so this is a lucrative market for business entities, and the competition to sell to governments around the world is fierce. See Agreement on Government Procurement (15 April 1994) Marrakesh Agreement Establishing the WTO, Annex 4, Legal Instruments—Results of the Uruguay Round, *33 ILM 1125* (1994).

50 See Chow (n 43); Dieter (n 49).

51 The primary issue that the Panel looked at was China's measures affecting the protection and enforcement of intellectual property rights; other issues addressed concerned the prima facie case; the panel's terms of reference; and the exhaustiveness of the TRIPS Art. 59; and information from WIPO. See WTO Dispute Settlement, *US v China Intellectual Property Rights (DS362)* (WTO One-Page Case Summaries) <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm> accessed 15 September 2016; also see '2007 US v China Intellectual Property Case' (*Global Times* 2011) <http://www.globaltimes.cn/content/672789.shtml> accessed 3 January 2015.

52 Chow (n 43).

53 Chow (n 43); Dieter (n 49).

China has not joined and is not a member. More so, since China's innovation policy is on 'government procurement', GATT Article III 8(a) exempts procurement by governments from the NTP.

In its final ruling on the *US v China IP* case, the Panel considered three primary IP issues dealing with copyright and trademarks:

First, China's criminal law and related Supreme People's Court interpretations establishing thresholds for criminal procedures and penalties for infringements of intellectual property rights.

In this regard, in its interpretation of Article 61 of the TRIPS Agreement (border measures—remedies), the WTO Panel found that while China's criminal measures exempt certain copyright and trademark infringements from criminal liability where the infringement falls below numerical thresholds fixed in terms of the amount of turnover, profit, sales or copies of the infringing goods, this fact alone is insufficient to found a violation as alleged by the US. This is because Article 61 does not require members to criminalise all copyright and trademark infringements. The Panel therefore found that the term 'commercial scale' in Article 61 means 'the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market.'

While the Panel did not endorse China's thresholds, it concluded that the factual evidence presented by the US was inadequate to show whether or not the cases excluded from criminal liability met the TRIPS Agreement's standard of 'commercial scale' when that standard is applied to China's marketplace.[54]

Secondly, the Panel considered China's Regulations for Customs Protection of Intellectual Property Rights and related measures that govern the disposal of infringing goods confiscated by customs authorities.

On this issue, in its interpretation of Article 59 of the TRIPS Agreement, the WTO Panel found that the customs measures were not subject to Articles 51 to 60 of the TRIPS Agreement in as far as they apply to exports. With respect to imports, the Panel stated that although the auctioning of goods is not prohibited by Article 59, the way in which China's customs authorities auction these goods is inconsistent with Article 59, because it permits the sale of goods after the simple removal of the trade mark only in more than exceptional cases.[55]

Thirdly, the Panel looked at Article 4 of China's Copyright Law, which denies protection and enforcement to works that have not been authorised for publication or distribution within China.

In its interpretation of Articles 9.1 (Berne Convention—Arts 5(1) and 17) and 41.1 of the TRIPS Agreement (enforcement—general obligations), the Panel found that while China has the right to prohibit the circulation

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[54] ibid.

[55] ibid.

and exhibition of works—as acknowledged in Article 17 of the Berne Convention—this does not justify the denial of all copyright protection in any work. The Panel stated that China's failure to protect copyright in prohibited works (ie, works banned because of their illegal content) was, therefore, inconsistent with Article 5(1) of the Berne Convention as incorporated in Article 9.1, as well as with Article 41.1, as the copyright in such prohibited works cannot be enforced. [56]

The implication of the WTO's ruling is that the US failed to prove that China met the threshold in terms of its intellectual property crime having violated the WTO's TRIPS Agreement. However, the Panel did not support China as regards the measures taken by China's customs and the publication market access issues.[57]

The Euro-zone Crisis

The Euro-zone crisis,[58] which was one of the effects of the recent GFC, was invoked by the hugely indebted members of the Euro-zone, mainly Italy, with a debt of some €1.8 trillion, and Greece with its €329 billion debt.[59] For example, Italy's balance sheet under its embattled former leader, Berlusconi,[60] was overstretched due to conflicting business interests, such as corruption trials and charges of fraud, and overspending which led to a battered economy. During Berlusconi's later years in office, there were serious issues, such as corruption trials, sex charges and fraudulent misrepresentation activities involving his media business. This caused

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56 ibid.

57 See "2007 US v China Intellectual Property Case' (n 51).

58 The European sovereign debt crisis (commonly known as the Euro-zone crisis) is an ongoing financial crisis that has made it difficult, if not impossible, for some countries in the Euro area to repay or refinance their government debt by seeking assistance of third parties.

59 Jamal Haidar, 'Sovereign Credit Risk in the Euro-zone' (2012) 13(1) World Economics 123–136.

60 The author discussed the impact on Italy, because of the central part Italy occupies as one of the biggest economies in the EU and becuase of the fraudulent misrepresented acts of Berlusconi (not as a former political leader, but based on his position in the Mediaset company), which is in line with the major thrust of the article FM.

investors to avoid investing their resources in Italy, which had been one of the leading economies in Europe.[61]

The leaders of Italy and Greece were compelled to resign in order to pave the way for new governments in their countries. Economic reform measures and spending cuts was also recommended by the leaders of the Euro-zone in the hope of improving their depressed economies.[62]

Divisions arose within the Euro-zone as to whether the European Central Bank (ECB) should implement a bailout package through the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM).[63] The members feared losing business and commercial investors in their home countries because of the impact of the crisis. For example, doubts were expressed by the German Chancellor, Angela Merkel, and then the French President, Nicolas Sarkozy. While France was conscious of its then 'triple A' credit-rating, Germany was against using the ECB as a lender of last resort to bail out these highly indebted members of the Euro-zone. This raised considerable tension among other weak economies within the Euro-zone.

There has been a move to put more stringent rules in place in the Euro-zone in order to bring greater control over matters of debt and spending.

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61 See Graeme Wearden, 'EU Debt Crisis: Italy Hit with Rating Downgrade' *The Guardian UK* (20 September 2011). Berlusconi was convicted of fraud and has been sentenced to four years in prison for tax evasion by the Italian court. However, his sentence was immediately reduced to one year under a 2006 amnesty plan to ease overcrowding in Italian jails. The prosecution says that Berlusconi and his partner, Fedele Confalonieri, falsely declared payments to their Mediaset TV Company to avoid paying taxes. They were also accused of artificially inflating prices for the TV rights of some 3000 firms, which were relicensed on Berlusconi's network, earning €250 million in illegal profits. In sum, his allegation at the Milan court in the *Mediatrade* case was over fiscal fraud and breach of trust in his business interests, See Editorial Staff, 'Former Italian PM Berlusconi Gets 1-year Reduced Sentence for Fraud' (*RT*) <http://rt.com/news/italy-berlusconi-jail-sentence-322/> accessed 13 January 2013.

62 The Euro-zone crisis did not only introduce adverse economic effects for the worst affected countries, but also had a major political impact on the incumbents or ruling governments in eight out of seventeen Euro-zone member countries. This led to power shifts in countries like Greece, Ireland, Italy, Portugal, Spain, Slovenia, and the Netherlands: see Nicolas Firzli, 'Greece and the Roots of the EU Debt Crisis' (2010) 2 (March).

63 In fact, the ECB made a bailout programme move by lowering interest rates and providing cheap loans of more than one trillion Euros to maintain money flow between European banks. An Italian default would be a credit event, meaning it could not occur under the voluntary arrangement that the EU is trying to force Greece into, because Italy is simply too large for banks to willingly take the write-downs needed to deal with its insolvency. Doing so would render many financial institutions insolvent. Even in the Greek case, it was doubtful whether they would get enough participation from the private sector to meaningfully reduce the Greek sovereign debt load. An Italian default would be uncontrolled and would immediately crystallise losses that must run through the balance sheets of everyone holding their bonds: see Felix Zulauf, 'On the Inevitability of Further Crisis in Europe' (Seeking Alpha, July 2011) <http://www.creditwritedowns.com/2011/11/running-through-italian-default-scenarios.html> accessed 7 January 2013.

This despite existing rules intended to curtail lavish spending and debt control.[64]

SECTION 5: FRAUDULENT MISREPRESENTATION AND THE GFC—APPLICATION AND ANALYSIS

Applying the principles and theory of FM in practice, to how it for example, caused the recent GFC, may not be as simple as they appear to one teaching the subject. As argued, a fine distinction can be drawn between what FM is in principle and theory, and how FM impacts or operates in a real-life scenario. I show here how FM affects the business activities of MNCs and other undertakings in the global market.

I argue that the problem is not that the GFC has affected businesses, it is rather the other way round—the fraudulent business activities of MNCs and poor corporate governance regulation within the global market have impacted on the global economy.

While most business analysts and academics agree that, in general, CSR ethical, legal and/or corporate governance accountability issues are at the root of the recent global economic downturn, they have failed to identify any specific aspect of these issues.[65] I agree that the primary forces behind the recent GFC is CSR of business and corporate governance accountability issues. However, most identify FM as one of the specific issues behind the crisis—that is, the FM business activities of MNCs and the fraudulent activities within the global market are at the root of the recent global financial crisis. This led to the collapse of global firms and further implicated their executives. I discuss some notable cases below.

Lehman Brothers and Enron

The collapse of Lehman was an aftershock of the GFC. It is documented that the accounts of Chief Fuld of Lehman Brothers, and CEO Skilling of Enron, show credible evidence that they fraudulently misrepresented facts, approved misleading financial statement, and used accounting gimmicks to

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64 See, for example, the EU Financial Service Action Plan 1998. There are also similar individual countries' rules such as the UK Financial Service Act (FSA) 1986; and the German Financial Matters Stabilisation Act (FSSA) 2008. In fact, the latter has really helped to boost Germany's financial system for over eight years by improving its business and economy.

65 See business analyst Hillman Saunders, European chief economist at Citigroup and International Commercial/Corporate and business law scholars, such as Balasundram Maniam and Helen Teetz, 'Current Realities of Ethical Issues in Corporate America: How Does Ethics Affect the Financial Arena' (2005) 8(1) Journal of Legal, Ethical and Regulatory Issues 83–98; Simon Deakin and Richard Hobbs, 'Falls Dawn For CSR? Shift in Regulatory Policy and the Response of the Corporate and Financial Sectors in Britain' (2006 Centre for Business Research, University of Cambridge, Working Paper No 333); Zerk, (n 6); Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar Publishing 2010); and Arman Grigoryan, 'Legal, Economic and Business Insights of Corporate Social Responsibility' (2011) 4(1) Business Intelligence Journal 37–58.

inflate result thereby luring many innocent shareholders and investors to invest in their businesses with devastating impact.[66]

Through its executives and most senior officials, Enron involved itself in a cleverly designed web of conspiracy, impersonation, forgery, deception, and over-estimation in a deliberate attempt to fraudulently misrepresent its financial statements in order to deceive innocent investors and the public in the US. The CEO, Jeffery Skilling, answered arrogantly and the dismissively to initial questioning regarding the company's transparency and initial doubts on the veracity of its financial statements that were believed to have been fraudulent.[67]

Mahindra & Mahindra

There have been recent allegations of FM against the executives and management of Mahindra & Mahindra, which have led to an ongoing lawsuit, filed as a class action, by five automobile dealers from the USA. The claimants have accused Mahindra & Mahindra (India's largest manufacturer of utility vehicles) of fraud, misrepresentation and conspiracy.[68] The failure of these global firms had serious implications for the recent GFC.

Fleshing-out the Linkages: Fraudulent Misrepresentation Case Studies and the Global Financial Crisis

My discussion so far suggests a link between FM in business, the case studies presented and the GFC. As argued earlier and for the purpose of emphasis: the views of scholars and experts suggest that excessive greed, deception and fraud in global business in the trading of credits

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66 Also, there is further and sufficient evidence that Ernst & Young, Lehman's auditors, failed to question and challenge fraudulent and misrepresented facts, or improper or inadequate disclosures in the firm's result. See F Guerrera, N Bullock and H Sender, 'Lehman Report Blames Top Executive' (*FT* 2010). <www.FT.Com>. See, also, Ikejiaku (n 21). Fraudulent misrepresentation by Enron executives had serious negative consequences. Enron's stock, previously valued at about US$80 fell drastically to selling for US$0,26 a share. Now, some of its executives are facing criminal charges. For example Ben Gilson Jr, the former treasurer of Enron, is serving a five-year sentence, and the former CEO, Jeffery Skilling, is facing indictment concerning the reasons leading to the crumbling of Enron. For more on Enron's scandal, see C Thomas and T Morris, 'Enron and Beyond: What's the World Coming To?' (2003) 73(1) The CPA Journal 8; Maniam and Teetz (n 65).

67 See Ikejiaku (n 21).

68 See *Mumbai (Global Vehicles) vs Mahindra & Mahindra* (unreported suit filed on 4 June 2012 in the US District Court in Atlanta, Georgia, an ongoing case of fraud, misrepresentation and conspiracy; J Satish, 'US Auto Dealers Files Law Suit Against Mahindra & Mahindra' *The Economic Times* 2012) <https://economictimes.indiatimes.com/automobiles/us-auto-dealers-files-law-suit-against-mahindra-mahindra/articleshow/13869516.cms?intenttarget=no> accessed 2 January 2013. Mahindra & Mahindra is a global automobile conglomerate with more than 1 555 000 employees in over 100 countries, with Mr Anand Mahindra as the Chairman and Managing Director. The lawsuit alleges that Mahindra may have duped hundreds of US auto dealers and walked away with more than US$600 million in cash and trade secrets.

and derivatives closely correlate with the financial crisis—the credit and derivatives issues associated with the GFC itself are not the problem if properly used. However, the problem was that during the 1990s and 2000s bankers, insurers and other business professionals took a far trickier—and riskier—approach to business activities within the global market, with credit and derivatives becoming a massive global gamble that facilitated the GFC.[69] It is also suggested that the financial crisis of 2008 and beyond was characterised by widespread fraud in the mortgage securitisation industry. Most of the largest mortgage originators and mortgage-backed securities issuers and underwriters were implicated in regulatory settlements, and many paid multibillion-dollar penalties for high-frequency, fraud-related manipulation.[70] This is evidenced by the cases discussed above.

One may, for example, point to my account of the US-China economic relations, which shows that China, had engaged in a profitable economic romance with the US for many years, but that things quickly 'cooled off' when China started resenting the US for precipitating the GFC through its subprime mortgage crisis. This is because US banks and its financial industry are believed to have created fictitious and misrepresented financial products that appeared really absurd, but were sold in huge quantities, both in the US and abroad.[71]

These security-packaged products (particularly subprime mortgages and financial products) fraudulently misrepresented genuine products that were sold abroad within the global market. To that effect, they were fraudulently and deliberately created in order to lure many international investors into buying them, unaware of the fraud behind their production. These security-packaged products depreciated in value and lost most of their worth, resulting in a fall in acquisition by global investors, which, in turn, led to a tightening of credit around the world with negative consequences for major global economies. When the subprime mortgage problem triggered the GFC, many in China believed or assumed that it was naïve and foolish to trust the US as they came to realise that the banking sector and other financial-industry players in the US appeared to be not only reckless, driven by greed and their own personal interests, but, in particular, that they were also oblivious to the impact of their fraudulently misrepresented machinations on other countries and within the global economy.

The case of the Euro-zone crisis as an aftermath of the recent GFC shows that, in business and commercial activities in countries such as Italy, Greece and others, FM must have contributed significantly to the Euro-

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69 See Juurikkala (n 3).

70 See Feinstein and Roehrkasse (n 3).

71 See Wayne (n 45).

zone problem. For example, Italy's Berlusconi,[72] who was prosecuted on allegations of FM, is a good case in point.

Berlusconi and his partner falsely declared payments to their Mediaset TV Company to avoid paying taxes. They were also accused of artificially inflating prices for the TV rights of some 3 000 firms that were re-licensed on Berlusconi's network, earning €250 million in illegal profits. In sum, his indictment before the Milan court in the *Mediatrade* case centred on fiscal fraud and breach of trust in his business interests—a clear case of FM. Berlusconi was convicted of fraud and tax evasion and sentenced by the Italian court to four years' imprisonment. This was later reduced to one year under a 2006 amnesty plan aimed at easing overcrowding in Italian jails.

The examples of Lehman and Enron also suggest that both Chief Fuld of Lehman Brothers and CEO Skilling of Enron fraudulently misrepresented facts and approved misleading financial statements, which lured many innocent shareholders and investors to invest in their businesses. Likewise, allegations of FM against the executives and management of Mahindra & Mahindra have resulted in an ongoing law suit—all with a devastating effect on the global economy and impacting on the GFC.

Fraudulent Misrepresentation by Global Firms: Some Critical Issues

Knowledge of commercial, business, corporate and company law suggests that the duty of loyalty frowns upon any act of FM within the corporations. The duty requires directors to act in good faith and in the best interest of the corporation,[73] and places limitations on the motives, purposes and goals that can legitimately influence directors' decisions.[74] The duty of care complements the duty of loyalty by requiring managers, heads, executives, directors or whomever within the organisation to exercise the degree of skill, diligence, and care that a reasonably prudent person would exercise under similar circumstances in any dealings with the corporation or company.[75] However, the many cases of FM identified in this article suggests that the majority of these managers and executives do not live up to the spirit of these principles guiding corporations.

In developed societies, for example, information on all environmental, social and governance (ESG) activities of a company are, as with its financial reports, not only standardised and government-mandated, but also

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[72] Note that Berlusconi was chosen for illustration and discussion in this article, not because he was a political leader in Italy, but rather because of his position as the Director of the Mediaset TV Company.

[73] See Elisa Scalise, 'The Code for Corporate Citizenship: States Should Amend Statutes Governing Corporations and Enable Corporations to be Good Citizens' (2005) 29(1) Seattle University LR 275.

[74] James Cox and Thomas Hazen, *On Corporations: Including Unincorporated Forms of Doing Business* vol 1–3 (Aspen Publishers 2003).

[75] Richie Clark, *Corporate Law* (Little Brown & Co 1986).

independently reviewed and audited.[76] There are various instruments that provide mandatory regulatory procedures or guidelines for companies.[77] Nations and regions as diverse as China, the UK the US and even South Africa have taken far-reaching steps towards introducing more mandatory elements into their corporate governance and CSR systems. As Horrigan clarifies, countries in the Anglo-American and Anglo-Commonwealth tradition (and even within corporate regulatory systems) have, in an effort to become more inclusive, been more explicit in sensitising a regime of corporate-laws consideration beyond the shareholders.[78]

The UK's legal system, for example, permits corporate managers or executives to engage in socially beneficial activities, provided, there is a plausible rationale, that the activities are in shareholders' interests, and that they do not violate the public interest/policy.[79] Therefore, corporate laws in most advanced countries, as opposed to those of the developing countries, put measures in place for the regulation of dishonest business activities by companies. However, current trends in the business activities of MNCs and undertakings within the global markets suggest that these procedures are inadequate in that FMs remain ruinous to the global economy.

However, unlike in most developed countries, corporate law in developing countries has a number of unique weak characteristics. First, the corporate legal system is often new. As a result, businesses have little experience in complying with the law and there are fewer judicial precedents mapping out the law's boundaries. Secondly, legal institutions in developing countries are often weak and regulations can go unenforced; agency problems can be a serious issue; and members of the judiciary may be corrupt. Thirdly, the operations of multinational corporations in these countries can lead to conflicts between the interests of home and that the interest of host states. Thus, both the laws regulating corporations and those governing CSR, and

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76 John R Robinson, 'A Call for Mandatory Corporate Social Responsibility Reporting' (2010) <http://english.alrroya.com/node/44794> accessed 12 May 2010.

77 This includes OECD, 'Guidelines for Multinational Enterprises (1976/2000)'; ILO, 'Tripartite Declaration of Principles concerning Multinational Enterprise and Social Policy (1971/2001)'; UN Global Compact, 'Corporate Citizen in the World Economy' (2000); EU Commission, 'Green Paper Promoting a European Framework for Corporate Social Responsibility' (2001); UNCHR, 'Norms on the Responsibilities of Transnational Corporations and Other Business Entities with regard to Human Rights' (2003); and EU Commission, 'Communication Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' (2006). See P Enrst, 'Corporate Social Responsibility from a Legal Perspective' (ACC Europe, Corporate Counsel Symposium Antwerp, March 2009) 5.

78 Horrigan (n 65); see also Bryan Horrigan, '21st Century Corporate Social Responsibility Trends—An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability' (2007) 4 Macquarie J of Business Law 85–122.

79 Irene Lynch-Fanon, 'The Corporate Social Responsibility Movement and Law's Empire: Is There a Conflict' (2007) LVIII(1) Northern Ireland Legal Quarterly p 1–21.

the degree to which those laws are enforced, may vary substantially across developing countries.[80]

While countries, such as South Africa and Botswana, may be supporting what appears to be robust corporate law and corporate governance systems, countries such as the DRC, Zimbabwe, Togo, Nigeria and so many others, lag far behind. For example, South Africa has specific legislation that compels companies to take the interests of certain stakeholders into account. The current corporate governance regime in South Africa imposes a legal duty on directors to adopt an inclusive approach in managing their businesses, and to reflect the values of good corporate citizenship and responsibility. This is evident in the Labour Relations Act 66 of 1995, the Promotion of Access to Information Act 2 of 2000 and the Broad Based Black Economic Empowerment Act 53 of 2003.[81] This notwithstanding, the bottom-line is that in developing countries corporate law has a number of weak characteristics that require urgent and far-ranging improvement.[82]

The issue then remains why it is that MNCs continue to perpetrate FM in their business dealings, and why there are other notable cases of FM within the global market. The situation, therefore, is that something more stringent and harsher (in the form of penalising fraudulent corporations or introducing punitive regulations against FM within undertakings in the global market) needs to be done if we are to salvage global business or to save he global market from collapse in the wake of the disastrous effects of the recent GFC.

SECTION 6: RECOMMENDATIONS AND CONCLUSION

Recommendations

I offer one key recommendation: the rate of resorting to legal action against corporations in the courts should be increased and the relevant courts need to prioritise such applications. In doing so, the courts need to look more closely at what is actually taking place within the company—that is, they should pierce the veil or carapace of any corporation engaging in FM in its business activities and/or prosecute those involved in such FM.

A brief, but useful, summary of the position regarding 'piercing the veil' in English criminal law was given by the Court of Appeal in the case of *R v Seager* [2009] EWCA Crim 1303, in which the Court said at paragraph 76:

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[80] See Boris Marinova and Bruse Heiman, 'Company Law and Corporate Governance Renewal in Transition Economies: The Bulgarin Dilemma' (1998) 6 European J of Law and Economics 231–261; See also Lynch-Fanon (n 79).

[81] Irene Esser and Adriette Dekker, 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) 3(3) J of Int Commercial Law & Technology 157–169. See, also, Lionel Hodes, 'The Social Responsibility of a Company' (1983) 100 SALJ 468–495.

[82] See Brian Ikejiaku, 'International Law Is Western Made Global Law: The Perception of Third World Category' (2014) 337 at (3) African J of Legal Studies at 337–356.

> There was no major disagreement between counsel on the legal principles by reference to which a court is entitled to 'pierce or rend' the 'corporate veil'. It is 'hornbook' law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders. A court can 'pierce' the carapace of the corporate entity and look at what lies behind it only in certain circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty. The court will then be entitled to look for the legal substance, not just the form—1) if offender attempts to shelter behind a corporate façade or veil to hide his crime and benefit;—2) where the transaction or business structures constitute a 'device', 'clock', or 'sham' that is an attempt to disguise the true nature of the transaction or structure, so to deceive third parties or the Courts.—piercing the corporate veil or lifting the corporate veil is a legal decision to treat the rights or duties of a corporation as the rights or liabilities of its shareholders or directors. Usually, a corporation is treated as a separate legal person, which is solely responsible for the debts it incurs and the sole beneficiary of the credit it is owed;—3) The principle in subsidiary is that individuals within a conglomerate will be treated as separate entities and the parent cannot be made liable for subsidiaries with inadequate capitalisation—4) Judicial dicta supporting the view that the rule in Salomon[83] is subject to exceptions are thin on ground. Lord Denning MR outlined the theory of the single economic unit where in the court examined the overall business operation as an economic unit, rather than strict legal form.

The lifting of corporate veils or piercing of the corporate carapace is crucial.[84] For example, the piercing of the veil of Enron in relation to the Enron scandal exposed in October 2001, eventually led to the bankruptcy of the Enron Corporation and the *de facto* dissolution of Arthur Anderson, one of the five largest audit and accountancy partnerships in the world. Many executives at Enron were indicted on a variety of charges and were later

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83 The case of *Salomon* and a few other relevant cases are instructive here. On the one hand, *Salomon v Salomon* [1897] AC 223 and *Adams v Cape Industry Plc* [1990] Ch 433 are the leading UK company law cases that illustrate in practice, the legal principle of separate legal personality/entity and the limited liability of shareholders. On the other hand, *Gilford Motors Co v Horne* [1933] and *R v Seager* [2009] EWCA Crim 1303 practically illustrates that in certain situations, particularly in circumstances involving serious fraudulent misrepresentation, impropriety and dishonesty, the court can pierce the carapace of the corporate entity and look at what lies behind it. Crucially, these cases also address the long-standing issues under the English conflict of laws. See, also, UK Insolvency Act 1986 and/or UK Company Act 2006, particularly ss 73–219.

84 Mark Roe, 'Political Preconditions to Separating Ownership from Corporate Control' (2000) 53(3) Stanford LR 1–71.

sentenced to prison.[85] Also, the courts may have frowned upon the legal principle of separate legal entity, when it allowed Berlusconi's Mediaset TV Company to act against him in person.[86] The court may likely frown on Mahindra & Mahindra in its current suit and may act directly against the management or executives of the company.[87]

The cases and examples selected in this article are vital in reflecting the major theme of 'fraudulent misrepresentation' as discussed in this piece. I equally support the school of thought, that propounds that bringing the perpetrators who ignited the grave financial crisis to justice, will be the most effective approach to practical regulation.

Exploring the Legal Mechanism

I suggest that the managers, heads, executives and directors (or those holding similar positions) should be held responsible for any fraudulently misrepresented actions by the corporations they represent. This is because they are responsible for directing the day-to-day affairs of the corporations and are in the best position to know what happens in them. Legal recourse against these individuals will help expose any other perpetrators in fraudulently misrepresented activities.

It is also necessary to consider the issue of *locus standi*. When deciding who has the *locus standi* to bring a potential action, I consider that class actions should be used against financial corporations for triggering the financial crisis through their fraudulent activities. I believe that class *locus standi* will be most effective because of what has been in practice, since most litigation cases against corporations are brought in class.[88]

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[85] See Bala Dharan and William Bufkins, *Enron: Corporate Fiasco and Their Implications* (Foundations Press, 2004). In fact, Jeffery Skilling, the former CEO of Enron, was convicted in 2006 of multiple federal felony charges relating to Enron's financial collapse, and was sentenced to twenty-four years and four months in prison. The US Supreme Court allowed appeal of the case in March 2010 and on June 2010, removed part of Skilling's conviction and the case was transferred back to the lower court for further proceedings. In April 2011, a three-judge panel of the 5th Circuit Court panel ruled that the verdict would have been the same despite the legal issues being discussed, and that Skilling's conviction was confirmed. See D Levine, 'US Appeal Court Upholds Jeff Skilling Conviction' *Reuters* 2011 <http://mobile.reuters.com/articles/idUSTRE73601Y20110407?irpc=932> accessed 21 December 2012.

[86] As argued, Berlusconi and his partner falsely declared payments to their Mediaset TV Company to avoid paying taxes. They were also accused of artificially inflating prices for the TV rights of some 3 000 firms that were relicensed on Berlusconi's network, earning €250 million in illegal profits.

[87] See *Mumbai (Global Vehicles) vs Mahindra & Mahindra* (n 67).

[88] There has been a series of reported class actions against corporations, though not financial industries. These include *Judith Vidal-Hall and Ors v Google Inc* [2014] EWHC 13; High-Tech Employee Antitrust Litigation 11-cv-2509; *Tabra and Ors v Monterrico Metal* [2009] EWHC 2475 (QB); and *Motto and Ors v Trafigura Limited and Trafigura Beheer BV* [2011] EWCA Civ 1150.

The fraudulent activities by financial industries that resulted in the GFC were not restricted to a particular country, but rather represented financial crimes that were widespread and were committed across borders. Therefore, the issue of which jurisdiction will have the legal capacity to prosecute such cases becomes relevant. It is suggested that international financial courts with headquarters in The Hague and with regional branches on the seven continents of the world should be established to handle cases of financial crimes of global dimensions.

I am of the view that greater recourse to legal action, coupled with courts' willingness to relax the rules and grant 'more' permission to lift the veil or pierce the carapace of companies/corporations that perpetrate FM in their business activities, and/or to prosecute those who engage in FM in their undertakings within the global market, will definitely go a long way in deterring companies/corporations and others.

This will act as catalyst to improve the role that corporate governance and financial regulation can play in reducing or mitigating the effects of the recent GFC and in ensuring a stable global financial economy in future.

CONCLUSION

I have examined the GFC of the late 2000s within the context of the robust academic debate on the divergent views on the primary causal forces behind the recent global crisis.

I considered both the view that, on the one hand, politics and the securo-protectionist policy of the US—in particular the war on terror—were major forces behind the GFC; and that, on the other hand, the fraudulent business activities of MNCs were a key factor behind the recent GFC.

I find that, while the US and UK's high military spending on defence or the protectionist enterprise crippled the efficacy of the global economy, it was, however, (i) the fictitious subprime mortgage-backed securities associated with US banks and the financial industry that fraudulently created misrepresented financial products that culminated in the series of events that precipitated the recent GFC; and (ii) issues of corporate social responsibility (CSR) and corporate governance accountability—specifically FM—that lie at the heart of the recent GFC, and which led to the collapse of global firms and implicated their executives.

I therefore concentrated on the examination of the implication of fraudulent misrepresentation within global business in the recent GFC. This was examined in theory by contextualising and understanding the legal principles of fraudulent misrepresentation in the law of contract; this was analysed and applied in practice using two brief cases illustrating the recent GFC. I considered this, using specific evidence of the US-China economic relations and the Euro-zone crisis, as well as the brief accounts of Lehman Brothers, Enron and Mahindra & Mahindra.

I found that China had, until recently, long enjoyed a beneficial economic relationship with the US, but that this has soured as a result of the US' perceived precipitation of the GFC through its subprime mortgage crisis. This is because US banks and its financial industry created fictitious financial products and because the US emerges as not only reckless and greedy, but also indifferent to the effect of its FM machinations on other countries and within the global economy.

I further established that FM in business and commercial activities in countries, such as Italy, Greece and others must have contributed significantly to the Euro-zone problem. Most notably here is the then Italian Prime Minister, Silvio Berlusconi, who was prosecuted for allegations of FM as a result of his involvement in fiscal fraud and breach of trust in his business interests.

I have also presented credible evidence that both Lehman Brothers' Chief, Fuld, and the CEO of Enron, Skilling, fraudulently misrepresented facts, approved misleading financial statements and used accounting gimmicks to inflate results, so luring many innocent shareholders and investors to invest in their businesses with a devastating impact on the global economy. Allegations of FM have also been levelled at the executives and management of Mahindra & Mahindra, which have resulted in an ongoing lawsuit filed by five automobile dealers from the US.

I therefore recommend the adoption of more stringent punitive measure for FM in the business activities of MNCs and within undertakings in the global market. I specifically suggest that courts should demonstrate a greater willingness to allow the piercing of the veil or carapace of companies involved in FM. I also considered the legal mechanism for achieving this.

My overall conclusion is that these suggestions will act as a catalyst in improving the role that corporate governance and financial regulation can play in mitigating the effects of the current financial crisis and in ensuring that stable global financial economy goes forward.